

**THE STATUS OF THE AFFIDAVIT OF MERIT AFTER *CORNBLATT***

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**7 N.J.L. 1047 (May 11, 1998)**

In *Cornblatt v. Barow*, N.J. (A-111 decided March 19, 1998), a unanimous Supreme Court held that the Affidavit of Merit Statute, *N.J.S.A. 2A:53A-26 et seq.*, is only applicable where the malpractice occurred after June 29, 1995, the effective date of the statute. In so doing, the Court reversed the Appellate Division, which had held that the statute applies to any case filed after the effective date, even if the malpractice occurred prior to that date. *Cornblatt v. Barow*, 303 N.J. Super. 81, 92 (App. Div. 1997) reversed N.J. (1998). The appellate decision had resulted in the filing of over one thousand motions for summary judgment where plaintiffs in malpractice cases had not served affidavits of merit. Although the dismissal of these malpractice cases has been averted, the Affidavit of Merit Statute creates many other issues. Attorneys handling professional negligence cases should be aware of *Cornblatt's* analysis of these issues.

In *Cornblatt*, an attorney sued his client to recover fees generated during a matrimonial action. The client counterclaimed for legal malpractice which had occurred prior to June 29, 1995. Nevertheless, the trial court dismissed the counterclaim due to the client's failure to submit an Affidavit of Merit. The Appellate Division affirmed, holding that the Affidavit of Merit applied to any case filed after the effective date of the statute, even if the malpractice occurred prior to the effective date of the statute. Within a month of the release of the Appellate Division decision, The New Jersey State Bar Association, The Association of Trial Lawyers of America and the Trial Attorneys of New Jersey filed a petition with the

Supreme Court seeking a stay of the summary judgment motions. In addition to the joint application filed by the Bar Associations, a virtual who's who of attorneys in the medical malpractice bar signed certifications in support of the motion for the stay.

On September 16, 1997, the Supreme Court entered a stay of the Appellate Division's decision. It is thought that the combination of the joint application by the three Bar Associations and the certifications of the highly respected members of the bar were significant factors in motivating the Court to take the unprecedented act of staying an Appellate Division decision case on the application of organizations that were not even parties to the underlying matter. As a result of the Supreme Court's stay of the Appellate Division decision, the vast majority of the so-called *Cornblatt* motions were stayed pending the Supreme Court's decision.

In an opinion written by Justice Handler, the Supreme Court has now reversed the Appellate Division. The Court noted that "the statute by its terms applies to 'causes of action which occur' on or after the effective date of enactment." The Court rejected the Appellate Division's conclusion that the word "occur" is synonymous with the word "file". The Court observed that the Legislature simultaneously enacted five bills as part of a tort reform package, and chose to use the word "filed" in the Joint and Several Liability bill and Punitive Damages Act, but the word "occur" in the Retail-Seller's Liability Act, the Healthcare Provider's Liability bill, and the Affidavit of Merit statute. The Court observed that it was appropriate to consider the entire statutory scheme in construing the statute, relying on *Kimmelman v. Henkels & McCoy, Inc.*, 108 N.J. 123, 129 (1987). (Ironically, it was Judge Kimmelman who authored the appellate decision in *Cornblatt*.) The Court therefore held,

“We disagree with the Appellate Division’s analysis and hold that the statute does not apply to malpractice actions filed on or after the effective date of the statute if the facts giving rise to the malpractice complaint occurred before that date.”

The Supreme Court decision also analyzed several other issues of importance to the malpractice bar. The Court briefly discussed the minimum required contents of the Affidavit of Merit, and held that the affidavit of merit need only contain the very limited information actually required by the statute.

The issue of what information must be included in the affidavit of merit is one of statutory construction...The statutory language here is clear and unambiguous. *N.J.S.A. 2A:53A-27* states that the plaintiff shall provide “an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.” That language is the only part of the statute detailing what must be included in the affidavit. Separately, the statute lists the affiant’s qualifications as mandatory requirements, but the statute does not describe those requirements as information that must be included in the affidavit. . . Interpreting the statute to mean that those qualifications must be included in the affidavit as the Appellate Division did goes beyond the statutory language itself.” Slip. Opinion at 24-25.

The Court reiterated its holding in *In Re Hall*:

The overall purpose of the statute is “to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation.” *In Re Petition of Hall*, 147 N.J. 379, 391 (1997)...That initial “threshold showing” of a meritorious claim is what the statute requires of the affidavit of merit.

This holding is consistent with the Court’s earlier promise “to avoid the risk that even a few meritorious cases may be dismissed for non-compliance with the statute.” *In Re Hall*, 147 N.J. 379, 392 (1997). The *Hall* Court also explained that the affidavit is “summary in nature”

and "need not be accompanied by the same detailed explanation and analysis...contained in an expert report." *Id.*

The Cornblatt decision also briefly addressed the qualifications required of the person rendering the affidavit and reiterated that the person rendering the affidavit need only "have particular expertise in the general area or specialty involved". Certainly, any physician who is qualified to testify as an expert witness as to the standard of care in the case is qualified to render the "initial threshold showing of a meritorious claim" required by the Affidavit of Merit Statute. For example, a breast surgeon would certainly be qualified to render the Affidavit of Merit in a case involving the delay in the diagnosis of breast cancer, even if the defendant is an obstetrician, as long as the breast surgeon is familiar with the standards of care of an obstetrician regarding treatment of patients with a breast mass. The fact that one need not be a specialist in the same field as the defendant, but rather merely have "particular expertise in the general area or specialty" is consistent with well established case law. See *Rosenberg by Rosenberg v. Cahill*, 99 N.J. 318, 334 (1985)[medical doctor competent to establish the standard of care as to chiropractor]; *Klimko v. Rose*, 84 N.J. 496 (1980)[medical doctor permitted to testify against chiropractor]; *Sanzari v. Rosenfeld*, 34 N.J. 128 (1961)[anesthesiologist established standard of care as to dentist who administered xylocaine]; *Carbone v. Warburton*, 11 N.J. 418, 425-426 (1953)[retired general practitioner qualified by study to testify against orthopedist]; *James v. East Orange General Hospital*, 246 N.J. Super. 554 (App. Div. 1991)[laboratory pathologist allowed to testify as to emergency room procedures], and the cases cited in *Bellardini v. Krikorian*, 222 N.J. Super. 457, 463 (App. Div. 1988).

The Supreme Court also held that “a dismissal for failure to comply with the statute should be with prejudice in all but extraordinary circumstances.” *Cornblatt*, Slip Opinion as amended by letter dated March 25, 1998. The Court acknowledged prior cases which held that dismissals for failure to state a claim should be without prejudice, but distinguished those cases by explaining “A dismissal for failure to submit an affidavit of merit is a violation of a statute rather than a court-imposed rule or order. The violation giving rise to the dismissal goes to the heart of the cause of action as defined by the Legislature.” The Court did hold that, in extraordinary circumstances, a dismissal may be without prejudice, but did not define what would constitute such extraordinary circumstances. However, on April 7, 1998, in *Zamft v. Cornell*, A-6858-96 (App. Div. 1998), the Appellate Division, in an opinion written by Judge Kimmelman, held that where the defendant did not demand an affidavit of merit in any responsive pleading, and where plaintiff did not knowingly attempt to disregard the purposes of the statute, the dismissal should be without prejudice.

The Supreme Court also discussed the distinction between an affidavit and certification. However, this issue is probably not going to be of much concern to the Bar since it is easy enough to prepare an affidavit to be signed by the expert. However, the Supreme Court did accept the doctrine of substantial compliance to “avoid technical defeats of valid claims”, citing *Zamel v. Port of New York Authority*, 56 N.J. 1, 6 (1970). Thus, where an expert report has been served, the plaintiff has substantially complied with the Affidavit of Merit Statute and the case should not be dismissed. As the Court explained:

“Despite the Legislature’s clear language requiring an affidavit, there is nothing reflective in the objectives of the Affidavit of Merit Bill or its history that suggests the Legislature intended to foreclose the familiar doctrine of

substantial compliance in the affidavit of merit context. . . There is no reason to infer that the Legislature intended that the statute be applied literally and strictly, rather than in a manner that would assure substantial compliance with its essential provisions. Thus, we recognize that, under certain circumstances, a certification could satisfy the purpose of the affidavit requirement as well as the general purpose of the statute. Those circumstances would also include at the very least the timely filing of a certification otherwise complying with all of the specifications for an affidavit of merit; and adequate and reasonable justification and a convincing explanation of just cause and excusable neglect for submitting a certification rather than an affidavit; and, further, that the adverse party was not prejudiced and obtained the requisite notice in that the certification contained the quality and level of information contemplated by the affidavit requirement. Further, a relevant circumstance would involve the plaintiff undertaking prompt measures to comply fully with the statute, including specifically the filing of an affidavit or the agreement of an adversary that the certification provided fully meets the substantive requirements of the statute. We determine that under such circumstances, the statutory requirement for the affidavit of merit would be deemed to have been met by the initial filing of a certification instead of an affidavit of merit."

The *Cornblatt* Court noted that it need not decide the constitutional challenges given the fact that these claims were not raised below and given its decision on other grounds. However, the Court implied that the separation of powers issue is not "implicated" by the Affidavit of Merit Statute relying on *Knight v. City of Margate*, 86 N.J. 374 (1981), an opinion also written by Justice Handler. The *Cornblatt* Court concluded that it was "unnecessary and inappropriate to deal conclusively with those issues."

In addition to *Zamft, supra*, those who are interested in the issues raised by the Affidavit of Merit Statute should also review *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Co.*, 1997 WL 664730 (D.N.J. 1998), where Judge Orlofsky held that the Affidavit of Merit need not be served on an out of state law firm or attorneys from that firm who are not licensed to practice law in New Jersey. In fact, a literal reading of the statute demonstrates that the only corporate entity that falls within the statute's protection is

a “health care facility” as defined by N.J.S.A.26:2h-2. The statute does not protect law firms, professional corporations or other partnership or corporate entities. As such, one should always consider including corporate entities as defendants in malpractice cases.

In conclusion, the Supreme Court has eliminated the immediate and most pressing concern presented by the Affidavit of Merit Statute, and provided guidance as to some of the other issues which remain to be resolved by the courts. The *Cornblatt* decision, as well as *In Re Hall*, supra, should be carefully reviewed by attorneys handling malpractice cases.

**Abbott Brown and William Gold represented the Amici Curie, the New Jersey State Bar Association, The Association of Trial Lawyers of America, and The Trial Attorneys of New Jersey in the Supreme Court in *Cornblatt v. Barow*.**

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